



JOINT MEETING OF THE MILPITAS CITY COUNCIL AND PUBLIC FINANCING AUTHORITY

AGENDA

TUESDAY, AUGUST 7, 2018

455 EAST CALAVERAS BOULEVARD, MILPITAS, CA

5:30 P.M. (CLOSED SESSION)

7:00 P.M. (PUBLIC BUSINESS)

XV. RESOLUTION

22. **Receive a Report from Fairbank, Maslin, Maullin, Metz and Associates (FM3) Regarding Public Opinion Polling of Two Potential Tax Measures; Adopt Resolutions Authorizing Placement of Transient Occupancy Tax Increase and Cannabis Use Tax Measures on the November 6, 2018 Ballot; and, Direct Staff to Initiate Process on Draft Zoning Ordinance to Regulate Cannabis Cultivation for Personal Use and to Prohibit All Commercial Cannabis Uses (Staff Contacts: Ashwini Kantak, 408-586-3053; Will Fuentes, 408-586-3111; and Renee Lorentzen, 408-586-3409)**

Background: On May 1, 2018, Council directed staff to proceed with having Fairbank, Maslin, Maullin, Metz & Associates (FM3) conduct public opinion polling for ballot measures related to a Transient Occupancy Tax (TOT) increase, a Cannabis Use Tax, and a Business License Tax Modernization. At the June 19, 2018 Council meeting, City staff and FM3 presented polling results for all three potential November 2018 ballot measures. Council was also presented with a recommendation to enter into an agreement with Hinderliter, de Llamas & Associates (HdL Companies) to assist the City with drafting cannabis use ballot language, establishing guidelines on cannabis uses and developing appropriate cost recovery fees, a tax structure, a zoning ordinance and a regulatory ordinance.

At the June 19 meeting, Council voted to:

1. **Not** move ahead on any proposal for Business License Tax adjustment at this time,
2. Direct staff to conduct additional polling on the TOT increase with a sliding scale from 12% to 14%, and return to Council in August with ballot measure language recommendations,
3. Direct staff to conduct additional polling and return in August with ballot measure language for a Cannabis Use Tax,
4. Direct staff to return to Council with a timeline to adopt a permanent ordinance prohibiting commercial cannabis uses in the City, and
5. Provide the City Manager with authority to use her discretion in executing an agreement with Hinderliter, de Llamas & Associates (HdL Companies) for cannabis consulting services relating to ballot measure drafting and other related services as deemed necessary.

Analysis: Following Council action, FM3 conducted additional polling for TOT increase and Cannabis Use taxes, both online and via telephone, from July 12 through July 19, 2018. Detailed results of the polling are included with the agenda packet and were scheduled for

presentation by FM3 at the Council meeting. FM3 polled 492 Milpitas residents on the following ballot language:

Transient Occupancy Tax – Option 1 (Maximum Rate up to 14%) (71 words)

“Milpitas Transient Occupancy Tax Measure. To provide funding to maintain general city services, including police/fire protection, 9-1-1 emergency response, senior/library services, park maintenance, pothole repair/street paving and attracting/retaining local businesses, shall an ordinance be adopted increasing the maximum transient occupancy tax paid by hotel guests, from 10% up to as much as 14%, providing approximately \$5,200,000 annually until ended by voters, subject to independent, public audits, with all funds used locally?”

Transient Occupancy Tax – Option 2 (Maximum Rate up to 12% in 2019 and up to 14% in 2020) (71 words)

“Milpitas Transient Occupancy Tax Measure. To provide funding to maintain general city services, including police/fire protection, 9-1-1 emergency response, senior/library services, pothole/street repair and attracting/retaining local businesses, shall an ordinance be adopted increasing the maximum transient occupancy tax paid by hotel guests from 10% to 12% in 2019 and to 14% in 2020, providing approximately \$5,200,000 annually until ended by voters, subject to independent, public audits, with all funds used locally?”

Cannabis Use Tax (75 words)

“Milpitas Cannabis Tax Measure. To provide funding for general city services, including police, fire, streets and libraries, shall an ordinance be adopted establishing City taxes on cannabis (marijuana) businesses at maximum rates of \$10 per canopy square foot for cultivation (adjustable for inflation), 10% of gross receipts for retail cannabis businesses, and 6% for all other cannabis businesses, providing approximately \$1,670,000 annually until ended by voters, subject to independent audits, with all funds used locally?”

Summary of Polling Results

TOT Increase

63% of respondents supported a TOT Increase in general at a +/- 4.9% Margin of Error (MOE)

- 63% of respondents supported a TOT Option 1 at a +/- 6.4% MOE
- 64% of respondents supported a TOT Option 2 at a +/- 6.4% MOE

Cannabis Use Tax

65% of respondents supported a Cannabis Use Tax at a +/- 4.9% Margin of Error (MOE)

For a TOT increase, staff recommends Option 1 since there is very little differentiation in public support between the two options. Option 1 would provide the Council the flexibility to set the rate and potentially provide the City with the greatest and most immediate positive fiscal impact while still remaining competitive with other nearby jurisdictions. Option 1 for the TOT increase ballot language would allow Council the flexibility to raise the TOT rate up to 14% (or lower) subject to voter approval of the ballot measure.

Option 2 for the TOT increase ballot language would allow the Council the flexibility to raise the TOT rate up to 12% (or lower) in 2019 and up to 14% or lower in 2020. An increase to 12% would generate approximately \$2.6 million in additional TOT revenue in the first year and could increase to \$3.6 million by Fiscal Year 2023-24 with the planned development of six new hotels within the next five years. An increase to 14% would generate approximately \$5.2 million in additional TOT revenue in the first year and could increase to \$7.2 million by Fiscal Year 2023-24.

The Cannabis Use Tax ballot language would allow the Council the flexibility to tax cultivation up to \$10 per canopy square foot or lower (adjustable for inflation), to tax retail

cannabis businesses up to 10% or lower, and to tax all other cannabis businesses up to 6% or lower. If the ballot measure is called for by Council and passed by the voters, HdL Companies would assist the City with developing final tax rates, within the parameters of the tax ordinance, that would generate the greatest potential for cannabis tax revenue and a sustainable cannabis industry within Milpitas. Using hypothetical assumptions, staff and HdL Companies project that a Cannabis Use Tax could generate between \$370,000 to \$1.67 million per year depending on allowable uses and number of businesses allowed for each use. Included in the agenda packet is a fiscal analysis based on various scenarios for tax rates, uses, and number of facilities. It is important to note that although the ballot language seeks to authorize taxation on various cannabis uses, including cultivation, Council must first approve those uses before related businesses are allowed to operate within Milpitas. Approval of the language for the ballot measure by Council and then the voters simply allows taxation on various cannabis uses should the current or future Council decide to allow those uses.

Required Level and Timeline of Approvals for Potential Ballot Measures

As indicated in a recent memo to Council, per California Government Code Section 53724 (b), “No tax subject to the vote requirement prescribed by Section 53723 shall be presented at an election unless the ordinance or resolution proposing such tax is approved by a **two-thirds vote of all members of the legislative body of the local government or district.**” Thus, for any tax measure to be placed on the November 2018 ballot, it will require approval by at least four of the five Councilmembers. Abstentions are effectively negative votes.

Also, as indicated in another recent memo to Council, The Tax Fairness, Transparency and Accountability Act of 2018, which would have required a two-thirds voter supermajority for all taxes, retroactive to January 1, 2018, has been pulled from the November 2018 ballot. Thus, both the general purpose TOT increase and Cannabis Use Tax before Council will only require a simple majority for approval by voters in the November 2018 election.

Approval of the Cannabis Use Tax ballot measure language by Council and later by the voters does not allow any specific cannabis uses, it simply allows taxation on various cannabis uses should the current or future Council or voters decide to allow those uses.

If the City Council decides to move forward with placing a Transient Occupancy Tax (TOT) Increase and/or a Cannabis Use Tax on the November 2018 ballot, City Council must adopt the related resolutions on or before August 10, 2018 to meet the required deadline set by California Elections Code (88 days prior to the November 6, 2018 election day). Here is a timeline of actions for potential November ballot measures:

Day of Week	Date	Action
Tuesday	August 7, 2018	Last regular City Council meeting to approve any November ballot measure language*
Tuesday	August 14, 2018	All Arguments in Favor or Oppose to be submitted to the City Clerk (84 days prior to November 6 Ballot)
Tuesday	August 21, 2018	Rebuttals to Arguments to be submitted to the City Clerk (77 days prior to November 6 Ballot); Attorney’s Impartial Analysis of each ballot measure to be submitted to the City Clerk
Tuesday	November 6, 2018	Election Day
Thursday	December 6, 2018	Final election results certified

*Last day to submit text to Registrar is August 10 (would require a special Council meeting)

Fiscal Impact: There could be positive revenue impacts should the City Council choose to place one or more tax measures on the November 2018 ballot and these measures are approved by Milpitas voters. A TOT increase could generate up to \$5.2 million in additional revenue in the first year and could increase to \$7.2 million by Fiscal Year 2023-24. A Cannabis Use Tax could generate between \$370,000 to \$1.67 million per year depending on allowable uses and number of businesses allowed for each use. There would also be costs associated with regulating the cannabis industry and these will be better defined by staff at a later date, with the assistance of HdL Companies, should cannabis uses be allowed within Milpitas. City costs for cannabis will be determined by number of uses and businesses allowed for each type and there is not enough information at the current time to make accurate cost estimates.

Both tax measures before Council are general purpose taxes and the estimated cost to place both on the November 2018 ballot is approximately \$50,000; already included in the FY 2018-19 budget and payable to the Santa Clara County Registrar of Voters. If Council were to approve cannabis establishments, staff, with the assistance of HdL Companies would develop and bring forward to Council appropriate fees to fully cover the costs of permitting and enforcement.

Policy Alternatives: Should the Council or the voters not approve a Cannabis Use Tax in 2018, there are other revenue generating mechanisms that Council could choose to consider if a future Council allows cannabis uses or a voter approved initiative requires it before the 2020 or later elections. These mechanisms include developer agreements, voluntary community benefit fee agreements, neighborhood responsibility fees, and operations agreements. These are used by other cities such as the City of Thousand Oaks (Operations Agreement), City of Sacramento (Neighborhood Responsibility Fee), City of El Monte (Development Agreement), City of Port Hueneme (Development Agreement), and City of Irvine (Community Benefit Fee). Any use of such fees though would require a thorough analysis to ensure compliance with Proposition 218, which limits the methods by which local governments can create or increase taxes, fees and charges without taxpayer consent.

Prohibition on Cannabis Businesses

On January 17, 2017, the City Council adopted Urgency Ordinance No. 291 pursuant to Government Code Section 65858, establishing a forty-five (45) day moratorium prohibiting all cannabis uses to the extent allowed by law in light of the passage of Proposition 64 in the State of California. On February 21, 2017, the City Council adopted Urgency Ordinance No. 291.1 extending the moratorium prohibiting all cannabis uses for a period of 10 months and 15 days. In January 2018, the City Council adopted Urgency Ordinance No. 291.2 extending the moratorium for an additional 12-month period for the full two years authorized under state law. The initial adoption of the Urgency Ordinance and the subsequent extensions were enacted primarily to allow the City Council Cannabis subcommittee the time needed to fully analyze and study potentially allowing cannabis uses in Milpitas.

The current urgency ordinance can only remain in place under state law until January 17, 2019 and no further extensions are available. Since future cannabis uses will likely not be determined before the moratorium expires, the City Attorney's Office has drafted the attached permanent ordinance prohibiting commercial cannabis uses in the City for Council to review. As this is a zoning ordinance, the Council cannot take action on the ordinance until the City complies with the procedures in state Planning and Zoning law, including Planning Commission review and recommendation. However, the City Council can review and discuss the ordinance and provide general direction to staff.

On the following page is a timeline for Council adoption of a permanent ordinance prohibiting commercial cannabis uses in the City.

Day of Week	Date	Action
Tuesday	August 7, 2018	Initial Council discussion of permanent ordinance
Friday	October 12, 2018	Last day to timely publish notice of permanent ordinance for Planning Commission consideration, assuming consideration at 10/24/18 meeting [10 day notice pursuant to Gov. Code §§ 65090, 65091]
Wednesday	October 24, 2018	Last day for Planning Commission to consider permanent ordinance and make recommendation to City Council
Friday	November 9, 2018	Last day to publish notice of permanent ordinance for 11/20/18 City Council consideration [10 day notice pursuant to Gov. Code §§ 65856(b), 65090]
Tuesday	November 20, 2018	Last regular City Council meeting to introduce permanent ordinance
Tuesday	December 4, 2018	Last regular City Council meeting for permanent ordinance to be adopted and take effect prior to expiration of cannabis moratorium ordinance
Thursday	January 17, 2019	Cannabis moratorium ordinance expires

Recommendations:

1. Receive a report from Fairbank, Maslin, Maullin, Metz and Associates (FM3) regarding public opinion polling of two potential tax measures for the November 6, 2018 ballot.
2. Adopt a resolution authorizing placement of a Transient Occupancy Tax (TOT) Increase Measure of up to a maximum of 14% on the November 6, 2018 Ballot.
3. Adopt a resolution authorizing placement of a Cannabis Use Tax Measure on the November 6, 2018 Ballot allowing taxes on cannabis (marijuana) businesses to be set at maximum rates of \$10 per canopy square foot for cultivation (adjustable for inflation), 10% of gross receipts for retail cannabis businesses, and 6% for all other cannabis businesses.
4. Direct staff to initiate process on draft zoning ordinance to regulate cannabis cultivation for personal use and to prohibit all commercial cannabis uses.

Attachments:

- a) FM3 Polling Results
- b) Cannabis Use Tax Revenue Estimates
- c) 2 Draft Resolutions – Transient Occupancy Tax Ballot Measure and Exhibit to Resolution: Transient Occupancy Tax Ordinance
- d) Draft Resolution – Cannabis Use Tax Ballot Measure and Exhibit to Resolution: Cannabis Use Tax Ordinance
- e) Draft Ordinance – Permanent Moratorium on Cannabis Uses